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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KAREN MARIE VOLLMER et al.,

Plaintiffs,

v.

JIMCO CONSTRUCTION AND
EQUIPMENT et al.,

Defendants and Respondents;

THE TRAVELERS INSURANCE
COMPANY,

Intervener and Appellant.

G029900

(Super. Ct. No. 800188)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Robert D.
Monarch, Judge. Affirmed.

Parker & Irwin and Donald W. Hitzeman for Intervener and Appellant.

Law Offices of Zurawski & Chase and James L. Chase for Defendants and
Respondents.

* * *

Plaintiff in intervention, The Travelers Insurance Company, appeals from the denial of its motion for relief from an order of dismissal under Code of Civil Procedure section 473, subdivision (b) (all further statutory references are to the Code of Civil Procedure). Travelers argues the trial court erroneously refused to set aside the order dismissing the case on the equitable ground of extrinsic mistake.

We affirm. Section 473, subdivision (b) requires that application for relief from dismissal must be made within “a reasonable time, in no case exceeding six months, after the . . . dismissal” Because Travelers’ motion for relief under section 473 was filed 14 months after the trial court ordered the entire case dismissed, relief under section 473, subdivision (b) was not available to Travelers.

Although not raised by Travelers in its moving papers and notwithstanding that section 473, subdivision (b) was unavailable, during the hearing on the motion, the trial court considered whether the dismissal could be set aside through the court’s equitable powers as applied by our Supreme Court in *Rappleyea v. Campbell* (1994) 8 Cal.4th 975. The trial court ultimately denied the motion. To qualify for equitable relief from dismissal based on a theory of extrinsic fraud or extrinsic mistake, a party must show (1) it has a meritorious case, (2) a satisfactory excuse for not presenting a defense against dismissal in the original action, and (3) diligence in seeking to set aside the dismissal once discovered. Because Travelers failed to make any showing that its complaint in intervention was meritorious, the trial court did not abuse its discretion in refusing to grant equitable relief and set aside the dismissal.

BACKGROUND

On October 1, 1998, Karen Marie Vollmer and Kent Vollmer filed a complaint for damages for personal injuries and loss of consortium against Jimco Construction and Equipment, Jay Nelson Hardesty, and James Dickey. The Vollmers’ complaint alleged defendants were responsible for an automobile collision involving

Karen Vollmer. On May 25, 1999, the case was referred to mandatory arbitration. On January 21, 2000, the court scheduled a postarbitration review hearing for March 9, 2000.

On February 23, 2000, Travelers filed a complaint in intervention against defendants Jimco Construction and Equipment, Jay Nelson Hardesty, and James Dickey. Travelers' complaint alleged Karen Vollmer's automobile accident occurred during the course of her employment with American Express Travel Services; Travelers is the workers' compensation insurance carrier for American Express Travel Services; and as a result of the accident, Travelers "has paid and continues to pay workers' compensation benefits to and on behalf of Vollmer." Travelers sought to recover all sums it paid for workers' compensation benefits for Karen Vollmer.

A minute order dated March 9, 2000 states the postarbitration review hearing was held on that date, there were no appearances, and the court set an order to show cause regarding dismissal for May 2. The court clerk was ordered to give notice. Travelers' counsel was not included on the minute order's service list. On May 2, at the hearing on the court's order to show cause regarding dismissal, the court ordered the case dismissed in its entirety.

Fourteen months later, on July 2, 2001, Travelers filed a motion for relief from the order dismissing the case under section 473, subdivisions (b) and (d). Travelers argued in its motion that the order of dismissal of the entire case took Travelers by surprise and the court should grant relief because Travelers did not have the opportunity to appear at the May 2, 2000 order to show cause hearing due to lack of notice.

Travelers' motion was supported by the declaration of its counsel, Paul Douglas, Jr., which stated: (1) on February 23, 2000, he was apprised by defendants' counsel that plaintiffs and defendants in the underlying action had reached a settlement and plaintiffs had executed a release; (2) on the same day, Douglas confirmed with the court clerk that a request for dismissal had not been filed and a dismissal had not been entered yet, but a postarbitration reviewing hearing was set for March 6; (3) Douglas

filed Travelers' complaint in intervention on February 23; (4) Douglas served Travelers' summons and complaint in intervention on the three named defendants by mail on April 10, and also sent a letter to defendants' counsel advising of the filing and service of the complaint in intervention; (5) in April 2000, defendants' counsel advised Douglas that a request for dismissal had been processed by the court and a dismissal had been entered on the plaintiffs' complaint; (6) in December 2000, defendants Jimco Construction and Equipment, James Dickey, and Jay Nelson Hardesty were personally served with Travelers' summons and complaint in intervention; and (7) Travelers first received notice the trial court had dismissed the case in its entirety when Douglas received a letter from defendants' counsel on January 4, 2001, advising him of the dismissal and enclosing a copy of the May 2, 2000 minute order.

The record does not include defendants' opposition to Travelers' motion. However, the record does include Douglas's supplemental declaration in reply to defendants' opposition. In his supplemental declaration, Douglas added the following: (1) because defendants' counsel advised Douglas in April 2000 the case had been dismissed, Douglas reasonably believed the service of Travelers' summons and complaint in intervention was deficient and thus he proceeded to re-serve defendants personally in December 2000; (2) during this eight-month time period, Douglas's mother had been diagnosed with inoperable pancreatic/gallbladder cancer which required Douglas to travel to Massachusetts for an extended period of time and contributed to the delay in re-serving defendants; (3) after receiving notice of the court's dismissal order in January 2001, Travelers asked Douglas to perform a potential subrogation recovery analysis regarding the complaint in intervention and the costs that would be involved in pursuing its claim; (4) in response to Travelers' request, Douglas had to "accomplish a complete review of a very voluminous medical file, in addition to a voluminous computer printout regarding all of the workers' compensation benefits that had been paid on Plaintiff, Karen Vollmer's claim" which took a "considerable amount of time to

complete”; (5) between February 2001 and May 2, 2001, Douglas took two extended trips to Massachusetts because of his mother’s illness and death on April 23; (6) after May 2, Douglas provided Travelers with his analysis; (7) on June 28, Travelers advised Douglas that it wanted to proceed with the motion for relief; and (8) the motion was filed on July 2, 2001.

Travelers’ motion for relief from the dismissal order was denied on September 7, 2001. Travelers appealed.

DISCUSSION

I. Relief Under Section 473

Travelers brought its motion for relief from the trial court’s order dismissing the entire case under section 473, subdivision (b), on the ground that Travelers was taken by surprise by the court’s order due to lack of notice. In the motion, Travelers requested as alternative relief that the court modify the order to reflect dismissal of the Vollmers’ complaint only under section 473, subdivision (d). On appeal, Travelers does not pursue its argument for alternative relief.

Section 473, subdivision (b) states in part: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, *dismissal*, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. *Application for this relief* shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and *shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . .*” (Italics added.)

Travelers agrees that its motion was filed more than six months from the date the court ordered the entire action dismissed. In fact, Travelers’ motion was filed 14 months after the trial court’s order of dismissal. Without offering any authority in

support of its argument, Travelers contends the six-month time period set forth in section 473, subdivision (b) is not triggered until the party is on notice of the dismissal. However, section 473, subdivision (b) does not include a notice provision and we decline to read one into the statute. Because section 473, subdivision (b) relief was not available to Travelers at the time it filed the motion for relief, the trial court properly denied Travelers' motion on that ground. (*Rappleyea v. Campbell, supra*, 8 Cal.4th 975, 980 ["The trial court in fact ruled on the ground that good cause was not shown under section 473 to set aside the default. The legal basis for that ruling was incorrect, because more than six months had elapsed from the entry of default, and hence relief under section 473 was unavailable"].)

II. Equitable Relief

During the hearing on Travelers' motion, the court considered, *sua sponte*, whether it was empowered to set aside the order of dismissal through its equitable powers. The court, concluding it could not, denied Travelers' motion.

Although Travelers did not request that the trial court grant equitable relief in its moving papers, Travelers contends on appeal the trial court erroneously (1) required Travelers to show extrinsic fraud before the court would invoke its equitable powers and (2) "overlooked the showing of extrinsic mistake made by [Travelers] in its moving papers."

We review the trial court's denial of Travelers' motion on equitable grounds for an abuse of discretion. (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 981 ["We review a challenge to a trial court's order denying a motion to vacate a default on equitable grounds as we would a decision under section 473: for an abuse of discretion"].)

Our Supreme Court in *Rappleyea v. Campbell, supra*, 8 Cal.4th 975, 981-982, in an analogous circumstance of a party seeking relief from a default judgment,

stated, “When a default *judgment* has been obtained, equitable relief may be given only in exceptional circumstances. ‘[W]hen relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. *Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted*.’” (Second italics added.) The Supreme Court further stated that “[o]ne ground for equitable relief is extrinsic mistake — a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. [Citations.] ‘Extrinsic mistake is found when [among other things] . . . a mistake led a court to do what it never intended’” (*Id.* at p. 981.)

The Supreme Court held that in order to set aside a judgment based upon extrinsic mistake, a party must (1) “‘demonstrate that it has a meritorious case’”; (2) “‘articulate a satisfactory excuse for not presenting a defense to the original action’”; and (3) “‘demonstrate diligence in seeking to set aside the default once . . . discovered.’” (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 982.) The same three-part test has been applied in cases where the theory of extrinsic fraud is asserted. (*Ibid.*)

Travelers contends the Supreme Court in *Rappleyea v. Campbell, supra*, 8 Cal.4th at page 982 held that a less stringent standard than the one applied in cases following entry of judgment applies in cases involving relief from default and, by analogy, relief from an order of dismissal, where judgment has not been entered. But in *Rappleyea v. Campbell*, the Supreme Court specifically stated that it need *not* decide whether the above-referenced test “applies to requests for equitable relief when a default judgment has not been entered” and thus did not hold a different standard applied in those circumstances. (*Ibid.*) Indeed, the Supreme Court analyzed whether the defendants were entitled to relief from a default by applying the same three-pronged test applicable to relief from a default judgment. (*Ibid.* [“Even under that stringent three-pronged test this case’s odd facts entitle defendants to relief”].) The Supreme Court did not state that any

other test would be appropriate for determining whether equitable relief is available after default.

Applying the test set forth in *Rappleyea v. Campbell*, *supra*, 8 Cal.4th 975, we conclude Travelers failed to establish the first prong of the test for extrinsic fraud or mistake: Travelers did not demonstrate in its moving papers, by way of declaration or otherwise, that the complaint in intervention had merit. Nothing in *Rappleyea v. Campbell* or in Travelers' brief provides authority that Travelers was not required to establish the first prong of the test for extrinsic fraud or mistake to obtain equitable relief from the order of dismissal. In view of Travelers' failure to satisfy the first prong of the three-part test of *Rappleyea v. Campbell*, we need not decide whether the second and third prongs were satisfied. Therefore, the trial court did not abuse its discretion by refusing to grant Travelers relief on the basis of extrinsic mistake or extrinsic fraud.

DISPOSITION

The order is affirmed. In the interests of justice, neither party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.